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Indigenous -Government Co-Management of Protected Areas: Booderee National Park and the National Framework in Australia

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Indigenous - Government Co-Management of Protected Areas:

Booderee National Park and the National Framework in Australia

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Information concerning the legal instruments discussed
in this case study is current as of June 2009.

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Contents

Acronyms and abbreviations	5
General introduction	6
 Part I – Booderee National Park	
<i>David Farrier and Michael Adams</i>	
1 Introduction	8
2 Wreck Bay Aboriginal Community Council	12
2.1 Role of the Council	12
2.2 Grant of a living area	12
3 Setting up Booderee National Park	12
3.1 Land grant and leaseback	12
3.2 Lease provisions	13
4 Managing Booderee National Park	13
4.1 Board of management	14
4.2 IUCN categorization	14
4.3 Making a management plan	14
4.4 Implementing the management plan	15
4.5 Environmental assessment	15
4.6 Aboriginal management and use	16
4.7 Enforcement	18
5 Financial management	18
6 Benefit sharing	18
6.1 Employment	19
6.2 Procurement	19
6.3 Research	20
7 Satisfying cultural aspirations without comprising biodiversity	21
7.1 Sole management	21
8 Transboundary management of biodiversity and culture	22
9 Evaluation	22
 Part II – Indigenous co-management of protected areas in Australia	
<i>David Farrier</i>	
10 Introduction	24
11 Aboriginal land rights and native title	25
11.1 Extinction of native title in protected areas	26

12	Co-management through Indigenous land use agreements	27
12.1	ILUAs in the Northern Territory	27
12.2	ILUAs in New South Wales	28
13	Co-management of protected areas in NSW	28
13.1	Co-management under NPWA Part 4A	29
14	Co-management of protected areas in South Australia.....	30
15	Indigenous Protected Areas.....	31
16	Conclusion	33
	References	35

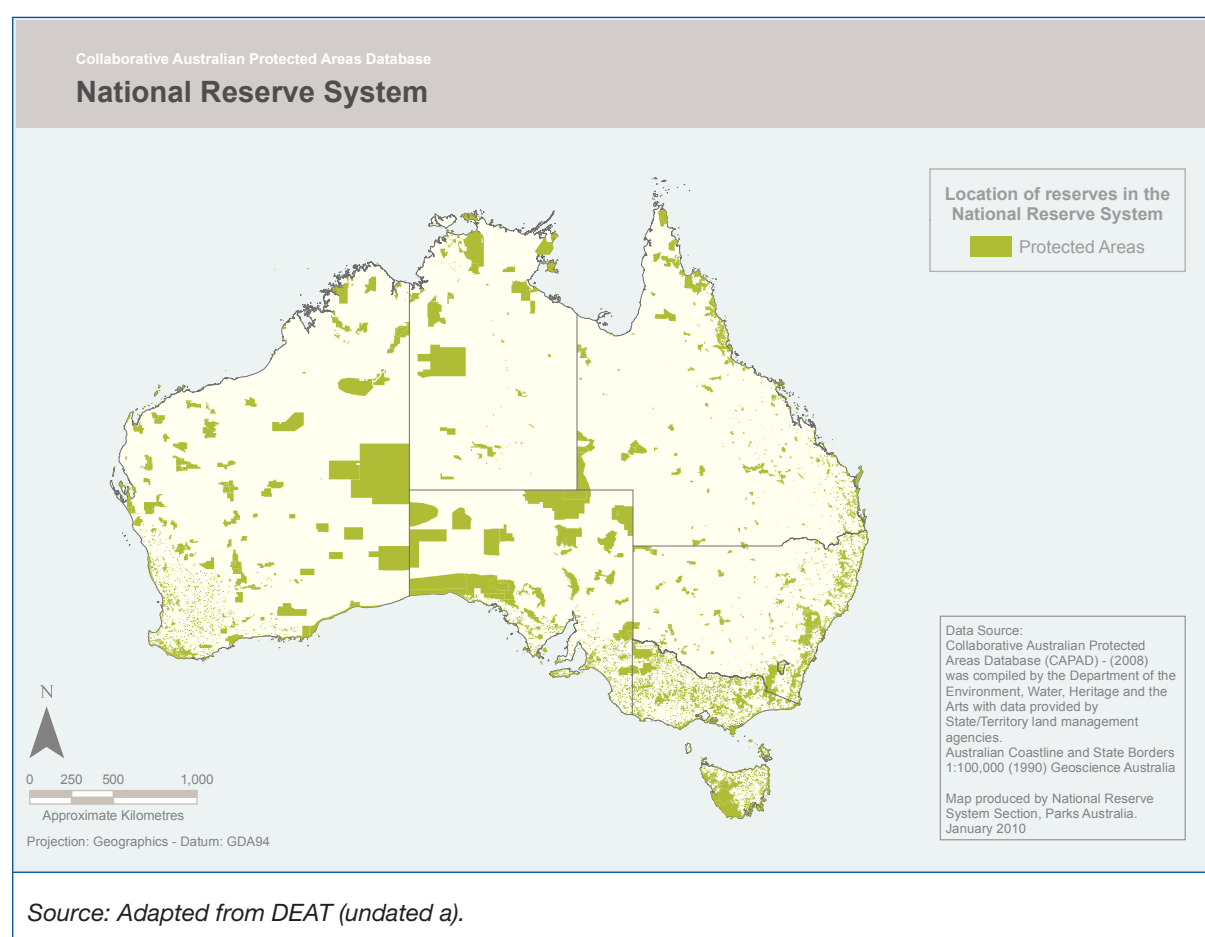
Acronyms and abbreviations

ALGA	Aboriginal Land Grant (Jervis Bay Territory) Act 1986
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999
ILUA	Indigenous land use agreement
IPA	Indigenous Protected Area
IUCN	International Union for Conservation of Nature
NPA	National Parks and Wildlife Act 1972 (South Australia)
NPWA	National Parks and Wildlife Act 1974 (New South Wales)
NRS	National Reserve System
NSW	New South Wales
NTA	Native Title Act 1993

General introduction

- 1 This case study comprises two Parts. Part I describes and assesses in some detail specific co-management governance arrangements for Booderee National Park, made between the local Aboriginal community and the national protected areas agency. Part II of the paper sets this specific case study in the broader context of a survey of a range of other protected area co-management arrangements in Australia. In a context where these arrangements are still evolving,¹ this survey does not claim to be comprehensive but focuses on accessible examples which reflect current practice in a number of jurisdictions. Its focus is limited. It details the formal arrangements as they appear in agreements and legislation to provide guidance to legislative drafters on the range of options available. Unlike the Booderee National Park case study, the broader survey does not attempt to evaluate the success of the various arrangements in practice, in terms of biodiversity conservation, on the one hand, and empowerment and community development, on the other. Evaluations of specific co-management arrangements in Australia have been carried out by others.²

Figure 1: The Australian National Reserve System and Booderee National Park



- 2 Australia has a federal system of government in which legislative power is divided between the Commonwealth (federal) government, and six state and two territory governments. The limited topics on which the Commonwealth Parliament has power to enact legislation are set out in the Australian Constitution. Most public land located in the states is state public land and each state has set up

1 For example, amendments to legislation which will provide a very different setting for the co-management of protected areas are currently under consideration in Western Australia (Sharp, 2009).
2 See, for example, Bauman and Smyth, 2007; Langton et al., 2005, pp. 39–41; Muller, 2003.

its own protected area system, including ‘national’ parks. Commonwealth public land was confined to a number of territories, including the Northern Territory (where two Commonwealth co-managed terrestrial national parks, Kakadu and Uluru-Kata Tjuta, are located) and the Australian Capital Territory, the only two territories that have significant levels of self-government. Booderee National Park, on what was once Commonwealth public land before it was handed back to the local Aboriginal community, is located in the Jervis Bay Territory (Figure 1). The Commonwealth Parliament has the power to enact legislation in relation to Australia’s territories, and Booderee National Park continues to be managed as a ‘reserve’ under the provisions of the current Commonwealth legislation, the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

Part I – Booderee National Park

1 Introduction

- 3 Booderee National Park, situated on the south-east coast of Australia, covers approximately 6,300 hectares, and includes Bowen Island and the southern portion of the marine waters of Jervis Bay. The region is one of Australia's major biogeographic nodes, and Booderee contains very significant flora and fauna communities, in part because of the geographic overlap between the northern and southern assemblages. The park is home to over 600 terrestrial plant species, and at least 26 terrestrial mammals, 13 marine mammals, 19 reptiles including 2 turtles, 15 amphibians and 200 bird species (see Box 1).³

Box 1: Booderee National Park

Location: Jervis Bay Territory, southern coast of New South Wales

Area: 6,312 hectares

Year proclaimed: 1992 (previously a nature reserve and botanic gardens)

Bioregion: Sydney Basin

Owner: Wreck Bay Aboriginal Community Council, leased to Australian government since 1995.

Management: Jointly Parks Australia and Wreck Bay Aboriginal Community

Fauna protected include:

- 26 native mammal species, 200 birds species including 40 water birds, 17 reptiles, 14 amphibians and 308 fish species.
- 16 species listed as threatened, including the eastern bristle bird (endangered) and green and golden bell frog (vulnerable).
- ground parrot and eastern snake-necked turtle
- 108 migratory or marine species including bottlenose dolphin, little penguin, and breeding colonies of migratory shearwaters
- Jervis Bay tree frog and Tyler's tree frog

Flora and ecosystems protected include:

- 625 native plant species occur on the park
- magenta lilly pilli or scrub cherry (threatened)
- the largest posidonia seagrass meadows in New South Wales
- eucalypt forest, relict rainforest, woodland, dry heath, wet heath, coastal scrub, wetlands and grassland; littoral communities of mangroves, salt marsh, rainforest and intertidal rocky platforms; and marine communities such as seagrass beds

Source: WWF Australia, 2008.

- 4 The area has been occupied by Aboriginal people for at least 20,000 years and contains important evidence of this occupation. More than 100 prehistoric Aboriginal sites have been recorded around Booderee. Most archaeological sites are shell middens,⁴ and their location and density reflect the continuity of fishing practices into the present generation. Other sites include rock shelters, burial sites, ceremonial grounds, stone-flaking sites and axe-sharpening grooves, and there is a high density of these sites in the vicinity of the current community of Wreck Bay.⁵

3 Commonwealth of Australia, 2002, p. 4.

4 Shell middens are archaeological features, usually containing mollusc shells, charcoal and other elements of the remains of human meals.

5 Commonwealth of Australia, 2002, pp. 4–5.

The park and its environs are deeply significant to local Aboriginal people, comprising a cultural landscape including sites of sacred significance as well as being of historic and economic importance. Local Aboriginal people continue to access wild resources through hunting, fishing and foraging, to supplement cash incomes.⁶

5

The park contains dramatic and spectacular coastal scenery including intact marine environments with very high water quality. The park is only 200 km south of Sydney, and attracts many visitors. Approximately 450,000 visitors access the park annually, engaging in walking, camping, swimming, diving and fishing.

6

British colonization began to impact the region in the early 1800s, with conflict, violence and the occupation of Aboriginal lands. A hundred years later, some Aboriginal people established a settlement at Wreck Bay, on the southern shores of what is now Booderee. This was formalized into an Aboriginal Reserve⁷ in 1954. In 1971, the Jervis Bay Nature Reserve was proclaimed,⁸ significantly reducing the size of the Aboriginal Reserve. In response, local Aboriginal people blockaded one of the access roads to a popular picnic and swimming site, triggering a long period of negotiation with the protected area managers. In 1986, the Commonwealth government enacted legislation, the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (ALGA), under which it granted 403 hectares outside the Nature Reserve as a living area to the Wreck Bay Aboriginal Community Council, representing the Aboriginal people of Wreck Bay.

7

In 1992,⁹ the Jervis Bay Nature Reserve was proclaimed as Jervis Bay National Park under legislation of the Commonwealth Parliament, the National Parks and Wildlife Act 1975.¹⁰ Aboriginal people were offered two places on a board of management. Further negotiations resulted in the entire park being transferred to the Wreck Bay Aboriginal Community Council in 1995. This was the result of special legislation, the Aboriginal Land Grant and Management (Jervis Bay Territory) Legislation Amendment Act 1995, and not a successful native title claim under the doctrine enunciated in the decision in *Mabo v Queensland (No.2)* and the Native Title Act 1993 (NTA).¹¹ The result of this special legislative arrangement between the Commonwealth government and the Wreck Bay Community was that possible uncertainties about the existence of native title were avoided. In addition, the potential for native title claims over the park from the wider group of traditional owners was effectively stifled because the special legislation did not protect future claims:

8

[...] devising an alternative joint management structure, that included the wider group of traditional owners and yet took account of the especial interest that Wreck Bay village has in the park because of its location, would undoubtedly have stretched bureaucratic imaginations. There were no precedents in New South Wales and the Jervis Bay Territory to identify traditional owners through research and land claim hearings... [...] Processes to identify native title holders were also in their infancy.¹²

Under this special arrangement, the park was 'leased back' to the Commonwealth, and is now jointly managed under the current Commonwealth legislation, the Environment Protection and Biodiversity

9

6 Egloff et al., 1995.

7 Gazetted under the Aborigines Welfare Ordinance 1954 (Australian Capital Territory).

8 Until 1989, Jervis Bay was part of the Australian Capital Territory, and the nature reserve was set up under the Public Parks Ordinance 1928 (Australian Capital Territory).

9 Commonwealth of Australia, 2002, p. 7.

10 This legislation has since been repealed and replaced by the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

11 In 1992, the Australian High Court held that the existence of native title was recognized under Australian law (*Mabo v Queensland (No. 2)* [1992] HCA 23; 175 CLR 1; 107 ALR 1). The Native Title Act 1993 (NTA) confirms recognition of native title, provides for processes to determine whether or not it exists and what rights it gives, and deals with circumstances when it is extinguished. See generally on native title, section 11 below.

12 Lowe and Davies, 2001, pp. 267–268.

Conservation Act 1999 (EPBC Act), by the Aboriginal community and Parks Australia, which is the government agency responsible for managing Commonwealth protected areas. It was renamed 'Booderee' in 1998, a local Aboriginal word meaning 'bay of plenty'¹³ (see Table 1).

- 10 Booderee National Park is adjacent to a naval officer training centre (HMAS Cresswell) and a naval range facility. It is contiguous with the Jervis Bay National Park (a national park owned and managed by the state government) and the Wreck Bay Aboriginal Community Council living area (Figure 2).

Table 1: Chronological history of Booderee

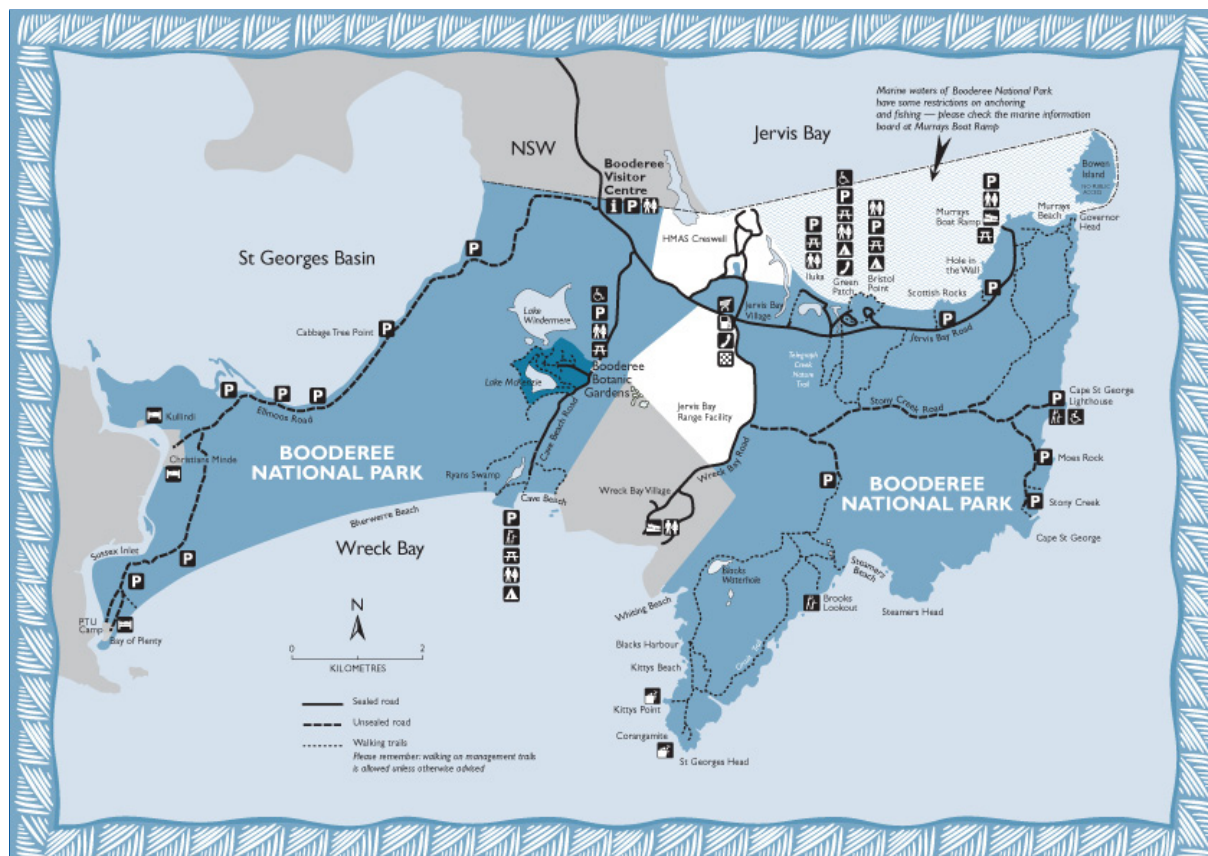
1800s	Early Europeans given estates on the South Coast of New South Wales (NSW) which started the dispossession of land from the local Aboriginal people
1830	Local Aboriginal people listed in the record for distribution of blankets and rations
1880s	Aboriginal reserves established on the South Coast due to the dispossession of traditional lands
1912	Naval College established at Jervis Bay
1915	Commonwealth acquires the Bherwerre Peninsula, which becomes a part of the Australian Capital Territory. Efforts were made at that stage to relocate the Aboriginal Community at Wreck Bay
1925	Aboriginal Protection Board of NSW accepts the Commonwealth offer to administer the Wreck Bay 'reserve' under the provision of the Aborigines Protection Act 1909 (NSW). First manager appointed
1929	Fish Protection Ordinance 1929–1949 has a provision that excludes Aboriginal residents of the Territory from paying for fishing license fees. Aboriginal initiative to establish a fishing industry in the region
1940	Aborigines Protection (Amendment) Act 1940 (NSW): Aboriginal people issued with 'dog tags'. Cultural expression continued to be outlawed to fit in with the assimilation policy of the day
1952	The boundary of the Wreck Bay Reserve marked out by Bob Brown, Archie Moore and Reg McLeod
1954	Wreck Bay Reserve is gazetted under the provisions of the Aborigines Welfare Ordinance 1954 (Australian Capital Territory).
1965	Aborigines Welfare Ordinance (Australian Capital Territory) is repealed, effecting the transfer of the 'reserve' from the Aborigines Welfare Board to the Commonwealth Department of Interior. The reserve is abolished and declared an 'open village'. Attempts to house non-Aboriginals at Wreck Bay opposed by the Community. Efforts again made to relocate the Community. Wreck Bay School moved to Jervis Bay.
1965	Wreck Bay Progress Association formed to counter the open village status and to secure land tenure, thus securing the community's future
1971	Proclamation under the Public Parks Ordinance 1928 (Australian Capital Territory) of the Jervis Bay Nature Reserve over the majority of the Territory including the non-residential land of the reserve
1973	The Wreck Bay Housing Company and the Wreck Bay Women's Committee formed. Land rights were the main issue for discussion between the Community and the Government
1979	Blockade of the Summercloud Bay Road, which prevents general public access to the Summercloud Bay day visitor area. This action was taken as a result of the land ownership issue
1986	The Aboriginal Land Grant (Jervis Bay Territory) Act 1986 enacted
1987	The Wreck Bay Community secure land tenure of 403 hectares of land via the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 and the Wreck Bay Aboriginal Community Council is established

13 Bauman and Smyth, 2007.

1992	Jervis Bay National Park is declared, replacing the Jervis Bay Nature Reserve. The Wreck Bay Community is offered 2 positions on a board of management of the new Park. The offer is rejected
1993	The Native Title Act 1993 is enacted
1994	The Commonwealth Ministers for Aboriginal and Torres Strait Islander Affairs and the Environment announce intentions of a land grant of the Jervis Bay National Park to the Wreck Bay Aboriginal Community. The Aboriginal Land Grant (Jervis Bay Territory) Act 1986 and the National Parks and Wildlife Act 1975 (Commonwealth) amended to facilitate land grant
1995	Amendments passed in both houses of Parliament and the Wreck Bay Aboriginal Community Council is granted freehold title to Jervis Bay National Park. Park leased back to the Director of National Parks
1996	The Jervis Bay National Park board of management is established with a majority of Wreck Bay Community representatives. For the first time, Wreck Bay people have a real say on how traditional lands are managed
1997	The Wreck Bay Aboriginal Community Council lodges a land claim for the remaining areas in the Jervis Bay Territory, which is not Aboriginal Land
1998	To reflect Aboriginal ownership the Jervis Bay National Park is re-named Booderee National Park
1999	Wreck Bay Enterprises Ltd is established
2000	Interdepartmental committee established to examine issues including the Wreck Bay land claim
2002	First Booderee National Park Plan of Management released

Source: Adapted from Commonwealth of Australia, 2002, pp. 6–7.

Figure 2: Booderee National Park



Source: DEAT (undated b).

2 Wreck Bay Aboriginal Community Council

2.1 Role of the Council

- 11 The ALGA created the Wreck Bay Aboriginal Community Council, a company with perpetual succession. The Council originally comprised all registered adult residents of the Jervis Bay Territory in 1986 whom the department responsible for the administration of the legislation was “satisfied are Aboriginals” (ALGA s 17). Others can be added (or removed) by a two-thirds majority at general meetings of the Council (ALGA ss 18(1) and 26(2)). The functions of the Council are expansive, ranging from conducting business enterprises and providing community services to managing Aboriginal land and protecting natural and cultural sites (ALGA s 6). In carrying out these functions, the Council is simply required to “have regard to” the preservation of the environment (ALGA s 47).

2.2 Grant of a living area

- 12 The ALGA was enacted prior to the recognition of native title by the High Court decision in *Mabo*. The Act set up a process to provide the Aboriginal community with a living area, requiring the Commonwealth government Minister responsible for the administration of the Act to declare 403 hectares of Crown land adjacent to the Jervis Bay Nature Reserve to be “Aboriginal Land” (ALGA s 8). Title and interests relating to the land vested in the Council, apart from rights to minerals (ALGA ss 10 and 14). This arrangement gives the community communal title to the land, with a right to exclusive possession, subject to existing uses by Commonwealth agencies (ALGA s 13). But it falls short of private ownership insofar as transactions related to land are restricted: it cannot be sold; leases and licences to use it can be granted for a wide range of purposes, including domestic and business use, but Ministerial consent is required where a proposed lease is to a party other than a Council member (ALGA s 38).

3 Setting up Booderee National Park

3.1 Land grant and leaseback

- 13 In 1995, the ALGA was amended¹⁴ to allow the Minister to declare land within what had by then become Jervis Bay National Park to be Aboriginal land under the ALGA if satisfied that the land was “of significance” for Aboriginal members of the community. But there was an important proviso: the Council had to agree to lease it back to the Director of National Parks (ALGA s 9A).
- 14 As a result, title to Jervis Bay National Park and Botanic Gardens was vested in the Council after a leaseback agreement was made and a lease granted to the Director of National Parks for 99 years, commencing on 14 December 1995. Further to provisions in the lease which allow it to be varied with agreement,¹⁵ the original lease was surrendered and replaced on 11 October 2003 by a lease for the remainder of the 99-year term. The Director is required to discuss possible variations to the lease with the Council every five years.¹⁶
- 15 Changes to legislation are identified as a fundamental breach of the lease, giving the Council a right to terminate it on 18 months’ notice, where the legislative changes are:

14 Aboriginal Land Grant and Management (Jervis Bay Territory) Legislation Amendment Act 1995.

15 Annexure to Memorandum of Lease between Wreck Bay Aboriginal Community Council and Director of National Parks, 21 October 2003, cl 21.

16 Annexure to Memorandum of Lease, cl 21.

- inconsistent with the lease, the management plan, the Council's rights as lessor, or the Council's ownership of the park; and
- are prejudicial to the rights of the Council or the community in a material respect as regards the ownership, occupation, use, administration, management or control of the park.¹⁷

With the enactment by the Commonwealth Parliament of the EPBC Act, Jervis Bay National Park, by this stage renamed Booderee National Park, became a 'Commonwealth reserve', administered under the general provisions relating to protected areas managed by the Commonwealth government, set out in Part 15, Division 4 of the EPBC Act.

16

3.2 Lease provisions

Under the lease, with the prior approval of the Council, members of the community have the right to enter the park and "use or occupy" it in accordance with Aboriginal tradition, and the right to continue traditional use for ceremonial and religious purposes. This is subject, however, to "reasonable constraints" imposed by the management plan for the reserve.¹⁸ The management plan provides for the development of guidelines to address this issue.¹⁹ The lease also provides that the Director, when requested by the Council, must not unreasonably refuse to grant a sublease or licence to a community member where this is in accordance with the EPBC Act and the management plan.²⁰

17

The Director also makes commitments in the lease:

18

- not to grant interests to others without the Council's consent;
- to promote and protect the interests of the community, and encourage the maintenance of Aboriginal tradition;
- to assist in the provision of resources for community involvement in the management of the park, including the establishment of a training programme in skills relevant to the park;
- to engage as many members of the community as practicable to provide park services;
- to encourage business and commercial initiatives by members of the community, utilizing traditional skills; and
- to give preference to the Council in issuing contracts to provide park services.²¹

The Director has agreed in the management plan to contract the Wreck Bay Community Council's services and engage as many community members as practicable to provide services relating to the park.²² Wreck Bay Enterprises Ltd has been established as a commercial company responsible for undertaking contracts awarded to the community both within and outside the park.

19

4 Managing Booderee National Park

Management procedures applying to Booderee are contained in the general provisions relating to Commonwealth reserves in the EPBC Act, but the Act modifies and supplements these to take into account the special circumstances of reserves situated on land leased from Indigenous owners.

20

¹⁷ Annexure to Memorandum of Lease, cl 16.

¹⁸ Annexure to Memorandum of Lease, cl 3.

¹⁹ Commonwealth of Australia, 2002, p. 116.

²⁰ Annexure to Memorandum of Lease, cl 4.

²¹ Annexure to Memorandum of Lease, cl 9.1(b) and 10.

²² Commonwealth of Australia, 2002, p. 96.

4.1 Board of management

- 21 If the traditional owners agree, a board of management must be established and, once established, cannot be disbanded without their agreement (EPBC Act ss 377 and 378). Appointments are made by the Minister (EPBC Act s 379) but the majority of members of the board must be Indigenous and nominated by the traditional owners (EPBC Act s 377). Members of the current board for Booderee also include a tourism representative and a scientist.²³ The board's role is to work with the Director of National Parks (EPBC Act s 376). It must balance "the interests and aspirations of the traditional owners, the need to protect and conserve the Park, and the interest of the wider community."²⁴

4.2 IUCN categorization

- 22 As required by the legislation (EPBC Act ss 346(1)(e), 346(2) and 367(1)(a)), Booderee was assigned by the original management plan to an IUCN protected areas management category. All zones in the park were placed in category II, with the exception of the Botanic Gardens (IUCN category IV: habitat/species management area).²⁵ Management must be in accordance with the Australian IUCN reserve management principles for this category, spelt out in the Environment Protection and Biodiversity Conservation Regulations 2000 made under the Act (EPBC Act ss 347, 348 and 367(3); EPBC Regulations Schedule 8), and the primary purpose for which the reserve is to be managed (EPBC Act s 348(2)). Booderee National Park has been given the following purposes:
- the preservation of the area in its natural condition; and
 - the encouragement and regulation of the appropriate use, appreciation and enjoyment of the area by the public.²⁶

4.3 Making a management plan

- 23 Management plans automatically terminate after 10 years (EPBC Act s 373). As a result, the original management plan for Booderee recently expired. Until a new plan is made, the Director is generally authorized to perform their functions and exercise powers²⁷ in accordance with the IUCN management principles applicable under the previous plan, subject to any directions by the Minister (EPBC Act ss 354A(11), 357 and 385). Preparation of the new management plan is the responsibility of the Board working with the Director (EPBC Act s 366). Disagreements between the Board and the Director are resolved by the Minister, who can seek the assistance of an impartial arbitrator (EPBC Act s 369).
- 24 General public consultation on the management plan is carried out in two phases. Public comment on the proposal to prepare the new draft plan for Booderee has already been invited and considered. Subsequently comment must be sought on the draft plan itself (EPBC Act s 368). In preparing the draft, the interests of the Wreck Bay Aboriginal Community Council must be considered in addition to biodiversity and heritage conservation (EPBC Act s 368(3)). Where there is "a substantial difference of opinion" with the Chair of the Wreck Bay Aboriginal Community Council over the draft management

23 Commonwealth of Australia, 2002, p. 13.

24 Commonwealth of Australia, 2002, p. 27.

25 Commonwealth of Australia, 2002, p. 26.

26 Environmental Reform (Consequential Provisions) Act 1999, Schedule 4, Part 2, Item 3.

27 The Director's functions include administering, managing and controlling Commonwealth reserves and protecting, conserving and managing biodiversity and heritage in these areas. The Director has broad powers to do anything to perform these functions (EPBC Act ss 514B and 514C). It does not appear that the Director can approve new activities in situations where there is no management plan, as distinct from ones carried out under the expired management plan (EPBC Act s 359B(1)(b)).

plan, the Minister must return it to the Director with suggestions and, ultimately, if the dispute is not resolved can seek an independent report before finalizing the plan (EPBC Act s 390).

After the Minister has signed off on the plan, it must be laid before both Houses of Parliament, either of which has the power to reject it (EPBC Act ss 370 and 371).

25

4.4 Implementing the management plan

The EPBC Act requires the management plan for the reserve to be consistent with the Director's obligations under the lease (EPBC Act s 367(1)(d)). However, this requirement has been diluted to some degree by qualifications in the lease itself. The lease makes it clear that most of the commitments made to the Wreck Bay Community are subject to "reasonable constraints" set out in the management plan.

26

The Director of National Parks must give effect to the management plan prepared for the reserve and Commonwealth agencies must not act inconsistently with it (EPBC Act s 362). The recently expired management plan is ambiguous in defining the relationship between the Board and the Director. The plan states that the Director is responsible for the day-to-day management of the park, through the park manager, and is "guided by" the Board. It then goes on to provide that the Director "will continue to support the Park Board as the authority that makes management decisions."²⁸ But the legislation gives the Minister the final say in jointly managed reserves on Indigenous land. Where the chair of the land council (in Booderee, the Chair of the Wreck Bay Aboriginal Community Council) disagrees with the Director about whether the latter is acting consistently with the management plan, the Minister rules upon the matter after receiving a report from a suitably qualified, impartial investigator (EPBC Act s 363). Similar arrangements exist where the Director reports to the Minister that a decision of the board of management for the reserve is contrary to the management plan or is "substantially detrimental to the good management of the reserve" (EPBC Act s 364).

27

The general position under the EPBC Act is that activities within a Commonwealth reserve, including development and taking native species, can only be carried out if they are in accordance with the management plan (EPBC Act ss 354 and 355). Civil and criminal penalties apply (EPBC Act ss 354(1) and 354A). Unlike Kakadu and Uluru-Kata Tjuta, the two other Commonwealth reserves on land leased from Indigenous owners, townships cannot be developed in Booderee (EPBC Act s 388). Under the management plan, mining is generally prohibited.²⁹

28

4.5 Environmental assessment

Significant activities in Booderee are also subject to generally applicable provisions relating to environmental assessment and regulation in the EPBC Act. Assessment and approval of the Commonwealth Minister for the Environment is required for:

29

- actions likely to have a significant impact on threatened or migratory species listed under the Act (EPBC Act ss 18–20B);
- actions taken on Commonwealth land or in a Commonwealth marine area, such as Booderee, that are likely to have a significant impact on the environment (EPBC Act ss 26–27A and 23–24A);
- actions taken outside Booderee that are likely to have a significant impact on the environment in Booderee (EPBC Act ss 26–27A and 23–24A).

28 Commonwealth of Australia, 2002, p. 28.

29 Commonwealth of Australia, 2002, p. 48.

- 30 Activities that are not likely to have a significant impact are assessed under assessment provisions in the management plan. All proposals that may have a potential impact on the interests of the Wreck Bay Aboriginal Community are referred to the Council for comment.³⁰

4.6 Aboriginal management and use

- 31 Under the lease, the Director covenanted that “the flora, fauna, cultural heritage, and natural environment of the Park shall be preserved, managed and maintained according to the best comparable management practices established for national parks and botanical gardens anywhere in the world.” Only to the extent to which they are consistent with this commitment are traditional Aboriginal land management practices to be used in the management of the park.³¹ In practice, there appears to be little evidence of any tension between Aboriginal land management practices and Western conservation management approaches. While there may be quite different beliefs underpinning the two approaches, in general the desired outcomes are the same.
- 32 There are detailed and complex provisions in Commonwealth legislation which exempt traditional practices pursued by Aboriginal people from generally applicable regulation, or even prohibition.
- 33 Section 211 of the NTA provides that holders of native title rights can carry out hunting, fishing, gathering and cultural or spiritual activities to satisfy personal, domestic or non-commercial communal needs, without needing to obtain approvals required by other laws such as the EPBC Act (EPBC Act s 8).³² Bartlett notes that this does not give any kind of priority to native title holders over those who have obtained approvals, including commercial users such as the fishing industry. Nor does it allow native title holders to carry out these activities where they are completely prohibited under legislation.³³ Those wanting to take advantage of this exemption in the NTA must be able to show that they are exercising existing native title rights.
- 34 Another provision, this time in the EPBC Act, may be more flexible insofar as it does not turn on the concept of native title and its exemption applies even where activities are not simply regulated but completely prohibited. It provides that traditional uses in Commonwealth reserves, for ceremonial and religious purposes as well as non-commercial hunting and food-gathering, are exempt from controls under the Act (EPBC Act ss 359A(1) and 354A(13); EPBC Regulations cl 12.06(1)(e)(i)). This exemption applies in all Commonwealth reserves, regardless of whether they are under co-management arrangements. There is, however a significant exclusion: regulations made “for the purpose of conserving biodiversity” can place express limits on traditional uses (EPBC Act s 359A(2)).
- 35 There are even broader exemptions from a range of other offences set out in the EPBC Regulations. These offences include such things as possessing hunting equipment (EPBC Regulations cl 12.18), camping outside a designated area (EPBC Regulations cl 12.28) and detailed provisions related to fishing (EPBC Regulations cl 12.35). The exemption extends to all members of the Wreck Bay Community Council when they are engaging in “traditional use”. It also covers traditional use pursued by any other Indigenous people who are “entitled by Aboriginal tradition to use or occupy the land” (EPBC Regulations cl 12.06(1)(e); EPBC Act ss 363(3) and 368(4)). This allows use by other Aboriginal people who may not regularly reside in the area but are recognized as having ongoing ties and rights to use and access resources. Note that while the EPBC Regulations effectively allow

30 Commonwealth of Australia, 2002, pp. 25 and 37–39.

31 Annexure to Memorandum of Lease, cl 17.

32 See Commonwealth of Australia, 2002, p. 24.

33 Bartlett, 2004, paras 27.32–27.33.

camping by Aboriginal people outside designated areas, the Community Council wishes to insert explicit provisions in the new management plan for particular areas of the park to be periodically closed to the public, to allow sole use by Aboriginal people. Note also the provision in the ALGA, empowering the Minister to declare an area of Aboriginal land, including land within Booderee, as being of special significance to the community. The Council can then exclude entry by others (ALGA s 48).

More generally, there is provision for agreements between the Community Council and the Director of National Parks setting out the circumstances under which otherwise controlled activities are allowed in Commonwealth reserves when carried out by Indigenous people. These activities include taking or keeping native species, using vehicles in prohibited areas and bringing a dog into the national park (EPBC Regulations cll 12.06(1)(d) and 12.08; EPBC Act s 363(2)).

Legal discussion in Australia has examined issues around Aboriginal traditional use including hunting. In *Yanner v Eaton*,³⁴ the High Court held that traditional hunting rights included the use of modern technology, such as using a dinghy with an outboard motor to hunt crocodiles. Regarding changes in the technology used in Aboriginal activities, the Australian Law Reform Commission recommends that “attention should focus on the purpose of the activity rather than the method”.³⁵

In practice, while Aboriginal management practices, including wild resource use, do not seem to have been a significant issue, there is acknowledgement from both the park managers and the Wreck Bay Community that there are unresolved concerns, mostly concerning marine harvest. The marine waters immediately offshore from parts of Booderee National Park are located in the Jervis Bay Marine Park, set up under legislation of the state of New South Wales (NSW). These waters fall under the control of the NSW Marine Parks Authority.³⁶ Ecologically sustainable fishing is allowed in NSW marine parks unless a sanctuary zone has been declared, but fishing remains subject to general fisheries law.³⁷ Harvesting of the pipi, an intertidal bivalve mollusc (*Donax deltooides*), has occurred for millennia in the region, as evidenced by the presence of pipi shells in middens dated to several thousand years. The contemporary seasonal harvest by Aboriginal people of this species, which is undertaken for special ceremonial events such as marriages and funerals, as well as ongoing subsistence harvest, is regularly in breach of NSW law. Under the fisheries regulations, a person cannot collect pipis for human consumption, but only to use as bait.³⁸ There is also a bag limit (covering both taking and possession) of 50 pipis per day.³⁹ There is, at the time of writing, nothing in the NSW legislation which would exempt customary Aboriginal use. To date, no prosecutions have resulted, but the Community Council is in discussion with the NSW Marine Parks Authority and the NSW Department of Primary Industries in an attempt to exempt this activity from the regulations. There is no indication that the level of Aboriginal harvest places unsustainable pressure on pipi stocks.

This activity also highlights the fact that many Aboriginal groups in Australia include ‘sea-country’ in their traditional territories. The Western tenure structures created by the various protected area types at Booderee (for example the terrestrial Booderee National Park and the NSW Jervis Bay Marine Park) impose a regulatory structure that acknowledges Aboriginal use rights in one domain and not the other.

34 *Yanner v Eaton* (1999) 201 CLR 351.

35 Commonwealth of Australia, 1986.

36 Marine Parks Act 1997 (NSW).

37 Gullett, 2008, p. 194.

38 Fisheries Management (General) Regulation 2002 (NSW), cl 128A(1).

39 Fisheries Management Act 1994 (NSW), ss 17–18; Fisheries Management (General) Regulation, cll 11–12.

4.7 Enforcement

- 40 Those appointed as wardens and rangers under the legislation (EPBC Act s 392) are responsible for enforcement in Commonwealth reserves. Members of the Australian Federal Police and officers of the Australian Customs Service are ex officio wardens (EPBC Act s 394). Wardens have more extensive enforcement powers than rangers, including powers to arrest without a warrant on reasonable suspicion that an offence has been committed (EPBC Act s 430), to search the person arrested for evidence (EPBC Act s 432) and to seize evidence (EPBC Act s 445). Like wardens, rangers can ask for a person's name and address on reasonable suspicion that they have committed an offence (EPBC Regulations cl 14.01; EPBC Act s 444) and can issue infringement notices (on-the-spot fines) for a range of offences (EPBC Regulations cl 14.02–14.14).
- 41 General statistics for terrestrial Commonwealth reserves between 2007 and 2008 indicate that prosecution is used as a last resort. Of 182 incidents involving the general public, 109 were dealt with by a verbal caution, 17 by warning letter and 57 by infringement notice. In 2007–08, there were three successful prosecutions relating to the marine area of Booderee, all for taking squid in excess of the daily recreational limit. Fines ranged from 350–500 Australian dollars.⁴⁰ These prosecutions did not involve Wreck Bay Community members but outside fishers. This illegal squid harvest was concentrated in seagrass beds that are particularly vulnerable to disturbance from this activity, and additionally are regarded as nursery areas for juvenile marine species. The prosecutions were seen, at least in part, as protecting resources and habitats of significance to local Aboriginal people.

5 Financial management

- 42 Australian jointly managed protected areas are often structured so that a proportion of visitor fees is paid to the Aboriginal owners, as well as to maximize employment opportunities for local Aboriginal people. Under the current lease, the Director pays to the Council 25 per cent of charges levied on visitors and 25 per cent of charges in respect of commercial activities, as well as an annual rent pegged to the Consumer Price Index.⁴¹ These amounts are for the use of the Community Council in providing services to the Wreck Bay Community, not for conservation management activities. While funding for community services and facilities is provided from various government sources, this income is used to cover shortfalls and to develop new initiatives. In 2007–2008, external revenue for Booderee was 1,231,000 dollars, of which 493,000 dollars was paid to the Wreck Bay Community. Total operating costs for the park were 6,909,000 dollars.⁴²

6 Benefit sharing

- 43 The concept of co-management implies benefit sharing. There are at least two parties involved, a government protected area authority and an Indigenous cultural group. For co-management to be successful, the interests of each need to be adequately addressed. At Booderee, Aboriginal people are focused on the protection of their cultural heritage as it is expressed in the natural environment and in the physical signs of culture, as well as on how to make a living in the 21st century. Caring for

40 Commonwealth of Australia, 2008, pp. 254–255.

41 Annexure to Memorandum of Lease, cl 7.1.

42 Commonwealth of Australia, 2008, p. 25.

country is a traditional Aboriginal responsibility and it makes sense that, if the Australian government wants the ‘country’ of Booderee protected, Aboriginal community members are the ones paid to do it. The corollary of this is that involvement in park work of various forms helps the continuity of culture: Aboriginal people are actively both caring for country and informing park management with respect to issues of cultural significance.

6.1 Employment

In the lease of Booderee to the Director of National Parks, the latter covenanted to “contract the Council’s services and engage as many Community members as is practicable to provide services in and in relation to the Park”, to modify working hours and conditions to reflect the needs and culture of Aboriginal people, and to utilize traditional skills in park management.⁴³ In 2009, approximately half of the employees of Booderee were members of the Wreck Bay Community.

Booderee has a training manager and an active training programme that has supported numerous Aboriginal people in skills acquisition and professional development. However, higher-level positions in the park employment structure are occupied by non-Indigenous people. Wreck Bay Community members acknowledge the special expertise and corporate knowledge of the non-Indigenous staff, but are keen in the longer term to build capacity among their members to eventually be able to fill these positions from the community. These aspirations are included in current negotiations to develop the new management plan.

Section 10 of the Public Service Act 1999 provides that employment decisions in the Australian Public Service are based on merit (s 10(1)(b)). This involves using a competitive selection process but, within this, assessment is based on “the relationship between the candidates’ work-related qualities and the work-related qualities genuinely required for the duties” (s 10(2)). Flowing from this, selection processes for jobs at Booderee include criteria intended to acknowledge that Wreck Bay Community members will have unique work-related qualities relevant to the park. Applicants must possess: (a) demonstrated knowledge and understanding of Aboriginal and Torres Strait Islander societies and cultures, and of the issues affecting these cultures in Australian society, particularly in relation to joint management arrangements within a national parks context; and (b) the ability to communicate sensitively and effectively with Aboriginal and Torres Strait Islander people, particularly in relation to jointly managed protected areas.

6.2 Procurement

In the lease of Booderee to the Director of National Parks, the latter covenanted to contract out appropriate services relating to the park and, in this context, to “give preference” to the Council and its wholly owned company, Wreck Bay Enterprises Ltd. In 2009, approximately 30 per cent of park services (for example, cleaning, road and track maintenance, and waste collection) were undertaken as contract work by Wreck Bay Enterprises Ltd. This commitment is, however, expressed to be subject to general government obligations relating to the procurement of goods and services.⁴⁴

Under the Financial Management and Accountability Regulations 1997, proposals to spend Commonwealth money must not be approved unless decision makers are satisfied that the proposed expenditure is in accordance with government policies and will make efficient and effective use of the

⁴³ Annexure to Memorandum of Lease, cll 10.1(g)–10.1(i).

⁴⁴ Annexure to Memorandum of Lease, cll 10.2(a)–10.2(b).

funds.⁴⁵ The policy framework is contained in the Commonwealth Procurement Guidelines.⁴⁶ Value for money is the core principle, underpinned by non-discriminatory, competitive procurement processes.⁴⁷

- 49 The Director of National Parks has entered into a services contract with Wreck Bay Enterprises Ltd, setting out the terms and conditions under which the company agrees to be responsible for the provision of services to the Director.⁴⁸ Individual service-level agreements made in accordance with the services contract then provide for specific services. The services contract recognizes the Director's commitment to achieving best value for money while acknowledging the obligations under the lease.
- 50 Tensions between the general government policy relating to procurement and the provisions of the lease are addressed in the services contract by setting up a process of performance monitoring through benchmarking. This is designed to determine whether the price is competitive with current market prices and the standards of delivery are equivalent. If a benchmarking exercise shows that performance fails to match current market prices and standards for delivery or that prices are not competitive, and the causes have been identified, Wreck Bay Enterprises Ltd has the option of improving performance, lowering fees or terminating the contract.⁴⁹ The most recent benchmarking exercise was undertaken by a major contractor to the naval officer training centre and range facility. The contractor undertook to carry out the exercise free of charge, as acknowledgement of its obligation to provide a degree of employment or other assistance to Aboriginal workers and enterprises. Both the park staff and the Community Council agree that the benchmarking process has acted to improve the business practices and competitiveness of Wreck Bay Enterprises Ltd.

6.3 Research

- 51 Booderee has an active research programme, including partnerships with prominent university researchers. Recent work includes an externally funded project by Professor David Lindenmayer from the Australian National University. This was a long-term study on the relationship between the fauna of Booderee and fire, focusing on understanding how whole ecosystems respond to different types and frequencies of fire. This project included a successful component targeting the training of a community member in biodiversity and fauna survey techniques. It is likely that this project will move into a second phase, which will again include community participation.
- 52 While the Lindenmayer research project demonstrates the inclusion of Aboriginal community members in external research, the Aboriginal majority on the board of management has also exercised control over proposed research activities that they considered to be culturally inappropriate. After the establishment of the Jervis Bay Marine Park in 1998, the board was approached with a proposal to carry out research on Booderee's white-bellied sea eagle (*Haliaeetus leucogaster*) population. Sea eagle populations are regarded as declining worldwide and in many parts of Australia⁵⁰ but the park is home to a healthy population which the researchers wished to examine. The white-bellied sea eagle is acknowledged by the Wreck Bay Community as their guardian animal, and it appears on the logo of the park. Aboriginal community members were concerned that potentially invasive research techniques could harm individual eagles, for whom they considered themselves culturally responsible. Accordingly, the board

45 Financial Management and Accountability Regulations 1997, cl 9.

46 Financial Management Guidance No. 1 (December 2008). These are issued under the Financial Management and Accountability Regulations, cl 7.

47 Department of the Environment, Water, Heritage and the Arts (DEAT), Chief Executive's Instruction 4.2, Procurement of Property and Services (undated).

48 Services Contract Between Director of National Parks and Wreck Bay Enterprises Ltd (ACN 093 444 869).

49 Services Contract, cl 32.

50 Shephard et al., 2005.

refused to give permission for the research. It is possible that alternative approaches to the research, that included community participants and did not involve handling eagles, may have been more readily accepted but this was not explored by the researchers.⁵¹

7 Satisfying cultural aspirations without comprising biodiversity

The most recent annual report for the park summarizes outcomes of conservation management activity: “Biodiversity monitoring at Booderee had positive results, with indicator species stable or increasing. [...] High numbers of key indicator species suggest that fox baiting is succeeding.”⁵² A number of species occurring in Booderee are listed under international agreements as well as under the EPBC Act. Active management is in place for these species.

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Booderee is a high-profile protected area in a number of respects, with 450,000 visitors annually. It has won several awards, nationally and locally, that to some extent indicate success in biodiversity conservation, visitor management and Aboriginal community satisfaction. For example, Booderee was included in the World Wildlife Fund 2006 ‘Top 10 reserves of the first decade of the National Reserve System’, and in 2008 it won the NSW Indigenous Tourism Award.

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Co-managed protected areas address not just biodiversity conservation but also the social and cultural aspirations of their associated communities. While this accords with the IUCN definition of protected areas, the concept of nature as separate from human society is central to Western thought and underpinned the early development of the Western form of protected areas. Co-management in Australia attempts to respond to Indigenous perspectives. These view nature as another aspect of culture: natural resources are cultural resources. In this view, the reasons for the Aboriginal community’s care for the environment might be quite different from the reasons expressed by the park authority but the outcomes are the same. There is an extensive literature examining these issues,⁵³ with an increasing recognition that Indigenous conservation activities in contemporary times address both environmental and cultural conservation, and the need to make a living. At Booderee, all these aspects are evident.

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7.1 Sole management

Booderee is unique in Australia for including the vision of ‘sole management’⁵⁴ in its management plan. The plan aimed to “develop and enhance the Community’s ability to eventually manage the Park”.⁵⁵ This aim is strongly supported by the Wreck Bay Aboriginal Community, with ongoing discussions about how it might be implemented. However, there is no indication that this would necessarily create any significant changes in conservation objectives. The concept of sole management may in fact be one of the key innovations from Booderee that may have much wider applicability. While sole management could be achieved through a range of different scenarios, the concept can catalyse a range of training and benefit-sharing processes.⁵⁶ Both park and Community staff emphasize that the Wreck Bay Community sees no distinction between the management of natural heritage and cultural heritage:

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51 Earlier, non-invasive research on large raptors was supported by the community.

52 Commonwealth of Australia, 2008, p. 47.

53 Much of it summarized in Berkes, 2008.

54 Commonwealth of Australia, 2002, p. ix.

55 Commonwealth of Australia, 2002, p. 26. A community liaison officer position has been funded by the Director (p. 28).

56 See Bauman and Smyth, 2007, p. 98.

Aboriginal culture is in part expressed in the ongoing and active care of the natural environment. The Community Council vision states: “by managing Booderee as an ongoing park, the Community seeks to protect the land and waters while earning income, creating jobs and achieving financial security.” The Wreck Bay Community sees the notion of sole management as acknowledging their rights as the owners, in both the Western and Indigenous sense, of the land and waters of Booderee.

8 Transboundary management of biodiversity and culture

- 57 While both park and community staff consider conservation management activities at Booderee to be highly successful, they also acknowledge the potential impact of threatening processes from outside the park. The geography of Booderee (sea on three sides, with a proportionally narrow terrestrial connection to land in the west) means it is vulnerable to being fragmented from the contiguous natural vegetation of the region, not all of which is protected. The regular occurrence of fire at Booderee means that connectivity to surrounding habitat may be crucial for the re-colonization of species after a fire. Increasing residential developments in the region around Booderee and recreational activities, including recreational fishing, may also have an impact on some species. A number of species range across all of the tenures surrounding Booderee and successful conservation for these species will require appropriate cooperation between agencies. Booderee management continues to liaise with other agencies and neighbouring landholders on the regional importance of the park, and concerning the importance of maintaining habitat corridors and links.
- 58 Somewhat surprisingly, while this cooperation is active and generally successful, it is essentially informal in that it is based on operational-level mechanisms rather than explicit agreements between agencies. Managers of the three protected area authorities operating in Jervis Bay (Parks Australia, the NSW National Parks and Wildlife Service, and the NSW Marine Parks Authority) all confirm that local-level operational interactions are sufficient and effective, and that higher-level agreements are not necessary.
- 59 From the perspective of Aboriginal communities, the complex tenure divisions also affect management of Aboriginal cultural heritage, and there are ongoing negotiations focusing on both appropriate access and protection for sites of cultural significance. Delia Lowe, an Aboriginal traditional owner, says:
- It is especially hard at Jervis Bay, because in working out where different Aboriginal people fit in around the bay, we get forced to look at maps that show the way the country has been divided up—between state and territory, between Navy and national park, between private land and government land.⁵⁷

9 Evaluation

- 60 This case study of Booderee National Park reflects outcomes and issues from the ongoing development of co-managed protected areas in Australia. Commonwealth legislation includes specific elements designed to facilitate cooperative management, and Parks Australia and the Booderee board of management have worked to develop a framework which will allow effective joint management. Current negotiations concerning the next management plan are expected to be positive.
- 61 The presence of the national park is seen as facilitating community development interests through the creation of contracting and employment opportunities. However, there continue to be unmet aspirations for higher-level positions in the park to be filled by local Aboriginal people. Significant steps have been

57 Lowe and Davies, 2001, p. 273.

taken to fulfil the social and cultural aspirations of the community without compromising biodiversity conservation objectives. While the community is keen to maintain and possibly increase the number of visitors, they would like increased control over specific areas of the park for sole Aboriginal use at particular times. The community aspires to sole management but exactly what this might mean in practice, beyond the symbolic significance of explicit acknowledgement of ownership, is unclear.

Even though Commonwealth legislation exempts Aboriginal management and use from a range of regulatory provisions, this is not considered to pose any threat to the successful maintenance of biodiversity. However, constraints placed on community cultural practices by legislation enacted in the neighbouring state of NSW (most obviously around bag limits for marine species) are perceived by the Wreck Bay Community as impeding the practice of Aboriginal culture.

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The primary threat to biodiversity conservation in Booderee, like the threat to Aboriginal cultural practices, comes from outside the jurisdiction covering the park, reflecting the problems posed for protected area management where jurisdictional boundaries drawn on maps are insensitive to cultural or natural boundaries. Attention has been drawn to the threats posed to connectivity by continuing development pressures on neighbouring land in the state of NSW. While the Commonwealth government, as we have seen, has the power to assess and regulate actions taken outside Booderee that are likely to have a significant impact on the environment inside the park, strategic land use planning for urban development is currently largely a matter for state governments. This is dictated to a large extent by the constitutional division of power, although there are opportunities in the future for the Commonwealth government to become more engaged where it can claim to be relying on an international trigger, such as the Convention on Biological Diversity.

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Part II – Indigenous co-management of protected areas in Australia

10 Introduction

- 64 Any discussion of arrangements for co-management of protected areas in Australia must begin by recognizing the intimate connection between land ownership and the negotiation of co-management arrangements. This requires us to start by considering in the following section the relatively recent recognition in Australia of Aboriginal native title, as well as the legislative regime which preceded this, under which rights over limited areas of land could be granted to Aboriginal peoples.
- 65 By definition, co-management arrangements cannot be imposed. They must inevitably be negotiated. The balance of power brought to the bargaining table depends in part on whether Aboriginal ownership of an area has already been recognized under Australian law and, if not, the likelihood of this question being resolved favourably, as well as the speed with which the determination is likely to be made. Where claims are contested, and can only be resolved by complex and lengthy procedures, one writer has argued that any partnership is not freely entered into and contains an element of coercion.⁵⁸
- 66 This is reflected in the early leaseback co-management model developed by the Commonwealth government for what is now Uluru-Kata Tjuta National Park, and later adapted for Booderee National Park. A claim made under land rights legislation had actually been rejected by the Aboriginal Land Commissioner because the area had already been declared a national park by the Commonwealth government, and was therefore not claimable under the land rights legislation. In 1985 a new government amended this legislation so as to hand back ownership of the park to the traditional owners. However, this hand-back was on condition that the land was leased back to government, to be co-managed as a national park.⁵⁹ This model has been applied to what is now Kakadu National Park as well as to Booderee.
- 67 The scenario is very different where Aboriginal ownership over an area of nature conservation significance has already been established and the government subsequently wishes it to be brought into the national reserve system. This has led more recently to a very different model of co-management, which closely resembles sole management, in what are known as Indigenous Protected Areas (IPAs).
- 68 Another factor which has led to a diversity of approaches to co-management in Australia is the existence of the federal and six state governments, as well as two territory governments, all with responsibilities for creating and managing protected areas. While a number of generally applicable legislative models are emerging, in the past special legislation has been used to put specific co-management arrangements in place. Booderee National Park is one example. But even earlier, the Northern Territory government enacted the Cobourg Peninsula Land and Sanctuary Act 1981 to create and provide for co-management of Gurig National Park (now Garig Gunak Barlu National Park). This example is distinctive because although negotiations were conducted under the cloud of an unresolved land rights claim, ownership was granted to a land trust to hold on behalf of the traditional owners without any requirement for a leaseback to the protected areas agency.⁶⁰

58 Smyth, 2001, p. 76.

59 Commonwealth of Australia, 2000, pp. 8–9; Aboriginal Land Rights (Northern Territory) Act 1976, s 12(2C). See Smyth, 2001, pp. 78–80.

60 Smyth, 2001, pp. 76–77. See also Foster, 1997.

11 Aboriginal land rights and native title

It was not until 1992 that the High Court of Australia held that the existence of native title in Australia was recognized under Australian law (*Mabo v Queensland* (No. 2)), rejecting the prevailing legal view that at the time of settlement Australia was *terra nullius*.⁶¹ But even prior to this ruling, most Australian governments had gone a little way towards recognizing the injustice of Indigenous dispossession by enacting legislation that allowed Aboriginal groups to claim limited areas of land.⁶² A number of protected area co-management arrangements have stemmed from claims made under such land rights legislation.⁶³

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Each jurisdiction developed its own distinctive form of statutory land rights.⁶⁴ Under the Aboriginal Land Rights (Northern Territory) Act 1976, for example, a local descent group of Aboriginal people could make a claim to public land in the Northern Territory in which nobody else had an interest provided that they had a primary spiritual responsibility for the land and were entitled by Aboriginal tradition to forage over it (ss 3, 11 and 50(1)). The Aboriginal Land Rights Act 1983 (NSW), on the other hand, did not require proof of any traditional association with land but allowed local Aboriginal land councils to claim public land which was not lawfully occupied or used and was not likely to be needed for an essential public purpose (s 36).

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The recognition of native title in the *Mabo* decision in 1992 added a new pathway for Aboriginal people to claim land but came replete with uncertainty. One reason for this is that the precise rights and privileges associated with native title depend on the traditional laws and customs of the group or clan who can show a connection with the land in question, rather than Western notions of private beneficial ownership. The concept of native title is now defined by Commonwealth legislation, the NTA. This legislation requires proof of rights and interests possessed under traditional laws and customs, and a connection of the native title claimants by those laws and customs to the land or waters in question (NTA s 223). Native title in any particular case may not provide exclusive possession but only rights to use the land for specific purposes, such as hunting and gathering or cultural ceremonies. Native title ceases to exist where the group loses its connection with the land by no longer acknowledging traditional laws or observing customs. However, as held in the decision in *Western Australia v Ward*,⁶⁵ proving the connection does not require physical occupation or continued use.

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In addition to the complexity surrounding whether native title can be shown to exist in the first place, there is the additional complexity arising from *Mabo* that the bundle of rights comprising native title has been extinguished in whole or in part in many areas of Australia as a result of governments in the past granting inconsistent or partially inconsistent interests.⁶⁶ For example, transferring land into private ownership extinguished native title completely. The issue here is not whether the use to which the land was put was inconsistent with native title but with whether the rights created were inconsistent.⁶⁷ Frequently, the result is partial extinguishment, where Aboriginal people retain specific rights to use land but lose a core right under traditional law and custom to be asked permission to enter it.

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61 That is, land which could be acquired by occupation because it was not subject to the sovereignty of any state.

62 Sutherland and Muir, 2001, p. 27.

63 Smyth, 2001, p. 83.

64 McRae et al., 2003, chapter 5.

65 *Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1 at para 64.

66 NTA, s 223; *Western Australia v Ward*.

67 *Western Australia v Ward* at para 215; Bartlett, 2004, paras 16.143–16.146 and 16.151.

73 Provisions relating to extinguishment have been incorporated into the NTA but the legislation still refers back to the case law. The result is a mish-mash replete with uncertainty. Native title must be established at considerable cost, on a case-by-case basis. It is highly variable and very fragile.⁶⁸ Native title law has been called “one of the most complicated and politically-charged areas of law in Australia”⁶⁹ and one of the judges of the High Court has referred to it as “an impenetrable jungle”.⁷⁰

11.1 Extinguishment of native title in protected areas

74 One of the vexed issues that has arisen is whether native title rights survive following the establishment of a protected area on public land. What is clear from the decision of the High Court in *Western Australia v Ward* is that whether native title rights have been extinguished turns on a very careful analysis by the courts of the facts relating to the establishment of each individual protected area. This includes:

- The land tenure history prior to designation of an area as a protected area: native title may already have been extinguished by earlier government actions, such as the grant of certain types of leases.
- The precise nature of the rights created with respect to the body given responsibility for managing a protected area. In *Western Australia v Ward*, the High Court held that “vesting” public lands in a public authority in trust for a public purpose, such as nature conservation, effected a transfer of ownership which extinguished native title. This was distinguished from situations where land was simply placed “under the control” of a public authority.⁷¹ The result is that the survival of native title in protected areas within state and territory jurisdictions may vary from jurisdiction to jurisdiction,⁷² and even within jurisdictions.
- The precise nature of the native title rights claimed. For example, according to the High Court, simply “reserving” publicly owned land for nature conservation prior to 1975 was inconsistent with and would extinguish the right of native title holders to be asked permission to enter the land. But, by itself, it was not necessarily inconsistent with native title rights to use land in accordance with traditional laws or customs.⁷³
- The precise date when the protected area was set up. Government actions after October 1975 are subject to Commonwealth legislation, the Racial Discrimination Act 1975, which mandates that Commonwealth and state legislation must not facilitate differential enjoyment of rights based on race, colour or national or ethnic origin. Arrangements to set up a protected area that terminated native title rights while allowing other pre-existing interests to continue would be invalidated by the Racial Discrimination Act. As a result, native title would not be extinguished. However, provisions in the NTA specifically validate some government actions that fall foul of the racial discrimination legislation, and even allow these actions to extinguish native title rights or restrict their operation, subject to a requirement to compensate native title holders.⁷⁴

75 The National Native Title Tribunal has nevertheless made some determinations that recognize native title to national parks. For example, the Adnyamathanha native title consent determination⁷⁵ recently recognized the Adnyamathanha People’s non-exclusive rights and interests over Flinders Ranges

68 Sutherland and Muir, 2001, pp. 30–33.

69 McRae et al., 2003, p. 279.

70 Kirby J in *Wilson v Anderson* (2002) 190 ALR 313 at 345.

71 *Western Australia v Ward* at paras 235–244; 249; Bartlett, 2004, para 16.146; Strelein, 2006, pp. 75–76.

72 Strelein, 2006, 78.

73 *Western Australia v Ward* at paras 219–222.

74 NTA, Part 2, Division 2.

75 30 March 2009. See National Native Title Tribunal (NNTT), 2009c. An Indigenous land use agreement (ILUA) for co-management of the park is now being finalized.

National Park, including the right to carry out ceremonial and cultural activities, hunt, camp and gather natural resources, such as ochres, resin and plants.⁷⁶ But the uncertainty of the law is perhaps reflected in the fact that these determinations have been made with the consent of the parties (consent determinations).

12 Co-management through Indigenous land use agreements

Indigenous land use agreements (ILUAs) are voluntary but formal agreements made by native title claimants under the NTA and registered by the National Native Title Tribunal. While they can be negotiated outside the complex process of litigation for resolving native title claims, they also offer a speedier method of resolving native title issues. They provide flexibility, and they can incorporate or trigger co-management arrangements for protected areas.

For example, in 2006 an ILUA was reached between the South Australian state government and traditional owners in relation to Vulkathunha-Gammon Ranges National Park. The latter agreed to excise the park from their native title claim in exchange for a co-management agreement under the South Australian National Parks and Wildlife Act 1972 (NPA), recognizing their traditional rights and interests and providing for the extent to which these could be exercised within the park.⁷⁷

Different types of ILUAs cover different scenarios. “Area agreements” (NTA ss 24CA–24CL) comprise the vast majority.⁷⁸ They can only be negotiated in situations where native title has not been determined for the entire agreement area (NTA s 24CC). They can be settled separately from a native title claim or be part of a native title determination. Area agreements can recognize the existence or non-existence of native title, and can also extinguish it by surrender to the relevant government (NTA s 24CB(e)), provided that this government is a party to the agreement (NTA s 24CD(5)). They can also offer full ownership to native title claimants of the land claimed or other land (NTA s 24CE).

Once registered with the National Native Title Tribunal, agreements are contractually binding on all those claiming native title to the area even if they are not parties to the agreement (NTA s 24EA(1)). But before registration, public notice must be given (NTA s 24CH), and reasonable attempts must be made to ensure that all persons who may hold native title have been identified and have authorized the agreement (NTA s 24CG(3)(b)). The aim is to make sure that all potential parties to the agreement are identified before it is registered (NTA ss 24CK and 24CL).

12.1 ILUAs in the Northern Territory

Following the High Court decision in *Western Australia v Ward*, the Northern Territory government set out to resolve the uncertainty relating to native title in Northern Territory national parks by developing a comprehensive approach. This resulted in the enactment of the Parks and Reserves (Framework for the Future) Act 2005 (PRA) which provides a framework for negotiations between the Territory and the traditional Aboriginal owners of certain parks and reserves. This includes a commitment to enter into ILUAs to facilitate a grant of ownership to Aboriginal land trusts, combined with a 99-year leaseback

⁷⁶ See also the consent determination for the Witjira National Park, South Australia (11 September 2008), consolidating a co-management arrangement that had existed for more than ten years: NNTT, 2009a.

⁷⁷ See NNTT, 2009b.

⁷⁸ As of the end of 2008, there were 357 ILUAs, of which 328 were Area Agreements: see Native Title Resources Guide, 2009.

and joint management (PRA ss 8 and 10). Leases do not extinguish native title rights and interests. There is a commitment to give preference to the participation of traditional owners in any commercial activities conducted under the lease. A community living area is to be provided (PRA Schedule 4).

- 81 Subsequently, 31 ILUAs over 27 parks and reserves in the Northern Territory were concluded, covering an area of approximately 17,700 sq km.⁷⁹

12.2 ILUAs in New South Wales

- 82 An ILUA between the NSW government and the Githabul people was registered in August 2007, following which the parties to the agreement approached the courts to make a consent determination recognizing the claimants' rights over 112,000 hectares of national parks and state forests. The consent determination granted non-exclusive rights, including access, camping, fishing, hunting and gathering for personal use, as well as the right to protect sites of cultural significance, with the ILUA detailing how these rights would be exercised. It included an agreement not to hunt with guns. The ILUA created an advisory committee consisting of seven Githabul people and two officers from the NSW environment agency. The agency committed to employ Githabul people in the parks.⁸⁰

13 Co-management of protected areas in NSW

- 83 Three different models of co-management operate in NSW:
- a memorandum of understanding for co-management;
 - co-management under an ILUA (see section 12.2, above); and
 - handover and leaseback arrangements under Part 4A of the NSW National Parks and Wildlife Act 1974 (NPWA).
- 84 Only reserves specifically identified in NPWA Schedule 14 as being of cultural significance to Aboriginal people can be handed back under Part 4A.⁸¹ This is on condition that there is a leaseback to the Minister (NPWA ss 71D and 71M). However, the legislation specifically preserves any native title rights and interests which may eventually be recognized under the NTA (NPWA ss 71C(4) and 71BI). A significant feature of Part 4A is the attempt it makes to micromanage decision-making processes relating to lease amendment and renewal, and management.⁸²
- 85 Seven areas have been identified, and so far four have been handed back to local Aboriginal land councils to hold on behalf of Aboriginal owners (NPWA s 71AD(1)(g)).⁸³ The three tribal groups involved in one of the remaining areas listed in Schedule 14, Mungo National Park, have decided not to pursue return of ownership at this stage but have entered into a co-management arrangement based on a memorandum of understanding. This establishes an advisory committee comprising a majority of members from the Three Traditional Tribal Groups Elders Council.⁸⁴

79 See NNTT, 2005.

80 See Department of Environment, Climate Change and Water (DECCW), 2009d; and Indigenous Land Use Agreement (Area Agreement): Githabul People, 2007. See also Agreements, Treaties and Negotiated Settlements Project (ATNS), 2007.

81 Other reserves can, however, be added to the list in Schedule 14 provided that they are assessed as being sufficiently culturally significant to Aboriginal people (NPWA ss 71AR–AW).

82 See especially NPWA s 71BJ relating to the arbitration of “disputes” between the government and Aboriginal owners.

83 See DECCW, 2009c.

84 See DECCW, 2008; and Mungo National Park Joint Management Agreement, 2004.

Another group, the Darug people, have also entered into a memorandum of understanding with the NSW government, but in this case as an interim arrangement while attempts are made to negotiate an ILUA, following their native title claim.⁸⁵ Another national park, Arakwal, has been co-managed under an ILUA since 2001.⁸⁶

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13.1 Co-management under NPWA Part 4A

Negotiations are conducted between the Minister, the relevant Aboriginal land councils and an Aboriginal negotiating panel (NPWA ss 71I and 71J). The panel comprises Aboriginal owners of the land in question where they have been identified or, if not, Aboriginal people appointed by the government to represent those who have a cultural association with the land (NPWA ss 71G and 71H). Where negotiations are successful, the existing protected area reservation is revoked, the land is vested in the relevant land council which immediately leases it to the Minister, and a new reservation is proclaimed (NPWA ss 71O and 71P). The land council can only act if it has the agreement of the Aboriginal owners (NPWA s 71BG).

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Leases must be for a term of at least 30 years (NPWA s 71AD(1)(b)) and must be reviewed at least once every five years. These reviews can lead to recommendations for amendments to legislation. The current legislation envisages that proposed amendments might be contested by the Aboriginal owners because it provides for arbitration where this is the case (NPWA ss 71AH(2), 71AH(3) and 71BJ). While amendments to the lease must ordinarily be consensual (NPWA s 71AH(4)), a lease can also be amended by legislation (NPWA s 71AK). On the other hand, renewals of the lease for further periods require agreement (NPWA ss 71AD(1)(c) and 71AI), giving the Aboriginal owners the power of veto.

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Rent must be negotiated so as to be sufficient to compensate for the fact that the Aboriginal owners do not have full use and enjoyment of their land, while at the same time taking into account Indigenous cultural restrictions on land use (NPWA s 71AE). Sale or mortgage of the land is prohibited, and other dealings with the land require the Minister's consent (NPWA s 71AD(1)(n)). The Minister must agree to implement an Aboriginal employment and training plan (NPWA s 71AD(3)).

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Care, control and management is vested in a board of management (NPWA s 71AO), comprising a majority of the Aboriginal owners, appointed by the Minister to represent gender and cultural affiliations within the community, and also including conservation, local council and local landholder representatives (NPWA s 71AN). The board must act in accordance with a plan of management (NPWA s 71AO(3)). Significantly, however, the board is subject to the "control and direction" of the Minister (NPWA s 71AO(4)), except where issues involving the management of Aboriginal heritage and culture are involved (NPWA s 71AO(5)). But there is also provision for arbitration of disputes between the board of management and the Director-General of the Environment Department (NPWA s 71BJ).

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Whereas the Director-General is ordinarily responsible for preparing draft plans of management in NSW protected areas, in co-managed areas under Part 4A the board of management prepares the draft, in consultation with the Director-General (NPWA s 72(1C)). However, after public consultation (NPWA s 73A), the final decision on whether to adopt or alter the draft plan lies with the Minister (NPWA s 73B). Plans expire automatically after 10 years but a new plan must be prepared at least six months before this (NPWA s 79A).

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⁸⁵ See DECCW, 2009b; and Darug Peoples MOU, 2007.

⁸⁶ See DECCW, 2009a; and Arakwal Indigenous Land Use Agreement, 2001. See also NNTT, 2007.

- 92 In addition to the management plan, provisions in regulations made under the legislation set basic ground rules relating to nature conservation (NPWA s 71AD(1)(j)). These can be amended provided that the relevant land council is first consulted (NPWA s 71AD(2)(a)), giving clear priority in the management arrangements to biodiversity conservation.
- 93 However, the NPWA itself contains provisions allowing Aboriginal owners under Part 4A and those who have the consent of Aboriginal owners on the board of management to take animals or plants for domestic, ceremonial or cultural purposes except where they have been listed as threatened or are protected under the management plan (NPWA ss 45(6), 56(7) and 57(7)). It is not necessary under this exemption to show that domestic use is in any way traditional.⁸⁷

14 Co-management of protected areas in South Australia⁸⁸

- 94 While the NSW legislation attempts to micromanage decision making relating to the lease and management of co-managed areas, Part 3, Division 6A of the South Australian NPA, added by amendment in 2004, simply makes general provision for the Minister to enter into co-management agreements, with the details of particular arrangements left to the agreements themselves. Transparency is preserved by making agreements publicly available (NPA s 43F(7)). The government can only give directions to the Director of National Parks and Wildlife relating to the management of the park if they are consistent with the agreement (NPA s 36(3)), marking another difference in approach compared to the NSW legislation discussed above.
- 95 Co-management agreements are either with landowners, where an area is Aboriginal-owned, or with a body representing the interests of the relevant Aboriginal group where public land is involved (NPA ss 43F(1) and 43F(2)). Precise details relating to variation of the agreement, the constitution and powers of the co-management board where one is to be established, preparation of a management plan, funding arrangements, access by members of the public, and the taking of flora and fauna by members of the Aboriginal group, are dealt with in specific agreements (NPA ss 43F(3) and 43F(4)).
- 96 An agreement can also specify a minimum period before it can be terminated. Otherwise, agreements relating to land that was already Aboriginal-owned when the protected area was set up can be terminated at any time by the owners or the Minister. Where the land was already public land, only the Minister can terminate the agreement (NPA s 43F(5)).
- 97 The decision as to whether a co-management board is established to manage the park (NPA ss 35(2a) (a) and 36(2)(a)) rests with the government. Where the land is Aboriginal-owned, a board must have a majority of members drawn from the relevant Aboriginal group (NPA s 43G). Management plans are prepared by the Minister with the collaboration of the board or, where there is no board, after consultation with the other party to the co-management agreement (NPA s 38). The Minister's general power to establish prohibited areas for the conservation of native flora and fauna can only be exercised in co-managed areas with the agreement of the board (NPA s 42(1a)). Even if the co-management agreement does not provide for the taking of flora and fauna by members of the particular Aboriginal group for food or cultural purposes, the board can issue general or specific permits (NPA ss 68D(5a) and 68D(6)).

⁸⁷ But compare NPWA s 71AD(1)(i). See also NPWA s 71AO(2).

⁸⁸ See Leaman, 2007.

Three different co-management models have emerged from these general provisions:⁸⁹

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- Aboriginal-owned parks that have a co-management board with a majority of Aboriginal members;
- Parks on public land that have a co-management board with membership determined by agreement between the Minister and the traditional owners; and
- Parks on public land with a statutory advisory committee which provides advice but does not have management control.

15 Indigenous Protected Areas

Following the signing of the United Nations Convention on Biological Diversity in 1992, the Commonwealth government in Australia committed to the establishment of a comprehensive, adequate and representative (CAR) protected area system within a national bioregional planning framework. In cooperation with the Australian states and territories, this has evolved into the National Reserve System (NRS).⁹⁰ The primary management objective of areas in the NRS is nature conservation.⁹¹

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It was quickly realized that a CAR reserve system would not be possible without the inclusion of land that was already in Aboriginal ownership. The Indigenous Protected Areas Programme was designed as a way of filling these gaps in the CAR reserve system. This included land claimed by Aboriginal groups under early state and federal land rights legislation, considered above, as well as land purchased with funding from the Indigenous Land Fund. The Fund was established after the decision in *Mabo* in recognition of the fact that most Aboriginal people would not benefit from recognition of native title because they could not show a continuing connection with their land.⁹² More recently, land over which native title has been successfully claimed has been declared an IPA.⁹³

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IPAs, then, are areas of land over which Aboriginal communities already have secure title, that are brought voluntarily into the NRS under the Indigenous Protected Areas Programme. This programme is one of the priority areas in *Caring for our Country*, a Commonwealth government funding initiative.⁹⁴ A funding application can be made by Aboriginal owners for community consultation and the development of a plan of management. Once an IPA has been declared by the owners, subsequent investment proposals can be made to implement the plan of management, covering such things as revegetation, threatened species monitoring, feral animal control, weed management, management of visitor pressure and protection of cultural heritage sites.⁹⁵ In 2008, the Commonwealth government committed additional funding to the Indigenous Protected Areas Programme,⁹⁶ following an evaluation of the NRS in 2006, which called for increased investment.⁹⁷

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The NRS itself has no foundation in legislation, although most of its individual components have been constituted under Commonwealth and state protected areas legislation. IPAs, however, are not declared as Commonwealth reserves, regulated under the EPBC Act, even though they fall within the

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⁸⁹ Leaman, 2007, p. 2.

⁹⁰ See DEAT, 2009d.

⁹¹ See Commonwealth of Australia, undated.

⁹² Langton et al., 2005, pp. 34–41; Smyth, 2001, p. 88; Szabo and Smyth, 2003.

⁹³ Warlu Jilajaa Jumu Indigenous Protected Area. See DEAT, 2009h.

⁹⁴ Funding can also be sought to establish cooperative management arrangements over existing State and Territory government-managed protected areas: DEAT, 2009e.

⁹⁵ Commonwealth of Australia, 2007.

⁹⁶ See DEAT, 2009d.

⁹⁷ Gilligan, 2006.

NRS. Commonwealth reserves can only be declared over land that the Commonwealth owns or leases (EPBC Act s 344(1)). IPAs are simply declared by the Aboriginal owners making a formal and public announcement that they intend to manage their land as an IPA in accordance with the management plan.⁹⁸ They are attractive to Aboriginal owners because they offer resources for land management without the loss of autonomy associated with other joint management schemes.⁹⁹ Smyth argues that while IPAs involve partnerships with government, this is “an expression of sole management, not a step on the journey towards sole management”.¹⁰⁰

- 103 On the other hand, IPAs offer no long-term security, either from a conservation or an Aboriginal perspective, because they are dependent on government funding arrangements as they exist from time to time.¹⁰¹ However, declaration of an IPA could be combined with a binding conservation agreement with the Commonwealth government (EPBC Act ss 304–312). Szabo and Smyth see this as a device for ensuring long-term government funding,¹⁰² but it necessarily involves loss of autonomy. Alternatively, formal arrangements can be made under state legislation.¹⁰³ For example Smyth, in a case study of the Dhimurru Indigenous Protected Area in the Northern Territory, points out that the declaration of this IPA was backed by a formal 21-year agreement between the traditional owners, the Northern Territory government and the Commonwealth government under the Territory Parks and Wildlife Conservation Act (Northern Territory), “the first statutory, multi-party agreement for the management of an IPA in Australia”.¹⁰⁴ Bauman and Smyth see this as a secure, robust alternative to leaseback joint management arrangements, which involve a loss of authority for traditional owners.¹⁰⁵ However, section 73 of the legislation under which the agreement was made provides no more than that the Northern Territory conservation agency can enter into land management agreements with Aboriginal landholders, including funding arrangements, to protect and conserve wildlife and natural features.
- 104 There are currently 25 IPAs in Australia, ranging in size from a few square kilometres to 1.6 million hectares.¹⁰⁶ After national parks in public ownership, IPAs constitute the second largest component of the NRS (over 16 per cent), covering nearly 2 per cent of Australia.¹⁰⁷ Between 1996 and 2007, 30 million hectares were added to the NRS and more than two thirds of this consisted of IPAs.¹⁰⁸ Some IPAs are adjacent to national parks.¹⁰⁹
- 105 The previous IUCN definition of protected area¹¹⁰ was clearly influential in the development of the IPA concept, particularly the reference to “associated cultural resources” and “other effective means”.¹¹¹ The most recent IUCN definition of protected area¹¹² continues to accord with the objectives of IPAs,

98 See DEAT, 2009c; Szabo and Smyth, 2003, pp. 150–151.

99 Muller, 2003; Smyth, 2001, p. 89.

100 Smyth, 2007, p. 129.

101 Leaman, 2007.

102 Szabo and Smyth, 2003, p. 160

103 Langton et al., 2005, pp. 37–38.

104 Smyth, 2007, p. 112.

105 Smyth, 2007, p. 127.

106 See DEAT, 2009b.

107 See DEAT, 2009g.

108 See DEAT, 2009d.

109 Commonwealth of Australia, 2007.

110 “An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means”: IUCN, 1994.

111 See DEAT, 2009a.

112 See Dudley, 2008.

which are a governance type rather than a protected area category. All IPAs are assigned to IUCN categories, particularly categories IV, V and VI, but occasionally categories II and III.¹¹³

16 Conclusion

Part II of this paper has described a number of protected area co-management arrangements in Australia, focusing on examples that reflect current practice in a number of jurisdictions, particularly the Commonwealth, the Northern Territory, South Australia and NSW. This provides the broader context in which to set the more detailed description and assessment of the co-management arrangements that are in place for Booderee National Park, discussed in Part I.

There are some common themes which make it possible to identify different models at a very general level. At the extremes, for example, there are clear differences between the governance arrangements arising from situations where the government is in a position to insist on a leaseback arrangement and situations where it must come cap in hand to established Aboriginal landholders in order to establish an IPA. But beyond these broad themes, decision-making structures generally depend to a considerable degree on specific arrangements reached in the course of particular negotiations, embodied in leases and other agreements. This is elaborated in some detail in the Booderee National Park case study. The significant exception to this is Part 4A of the NPWA, which goes to some lengths to spell out detailed decision-making responsibilities in the legislation itself. While the Commonwealth's EPBC Act also contains detailed provisions relating to decision-making responsibilities, at the same time it requires management plans to be consistent with government obligations under the lease.

IUCN has drawn broad distinctions between:

- 'collaborative management', a form of shared governance where decision making rests with one entity but the entity is required to consult other stakeholders;¹¹⁴
- 'joint management', where those involved in shared governance are part of a decision-making body and share legal authority for decision making; and
- governance by Indigenous peoples and local communities (Indigenous and community conserved areas or ICCAs).¹¹⁵

The current discussion suggests that in Australia these distinctions can only be drawn after very careful analysis of decision-making structures spelt out in legislation, agreements and management plans, and even then may not easily be made. As we have seen in the discussion of the NSW legislation, even where there is a board with a majority of Aboriginal owners, in which care, control and management of a protected area has been vested, the board is subject to the "control and direction" of the Minister. But the situation here is confused by a further provision for arbitration of disputes between the board of management and the government agency. The sensitivities involved in co-management negotiations seem to demand some blurring at the edges when it comes to determining final decision-making powers, perhaps in the expectation that specific disputes will themselves be negotiated, in accordance with Aboriginal tradition, rather than calling for an assertion of authority by the government.

Of the Australian governance types discussed here, the only one close to the third of the above mentioned IUCN governance types, the ICCA, is the IPA, voluntarily declared by Aboriginal owners. But

¹¹³ See DEAT, 2009f. See also Commonwealth of Australia, 2007.

¹¹⁴ "Collaborative management" and "joint management" are considered to be sub-categories of co-management. See Dudley, 2008, pp. 25–32.

¹¹⁵ Dudley, 2008, pp. 25–32.

even IPAs will experience some external management constraints because of their heavy reliance on government funding.¹¹⁶ What the Booderee National Park case study shows is that in Australia the idea of 'sole management', which the ICCA governance type attempts to encapsulate, while symbolically significant, is an elusive one to delineate in practice. ICCAs may assume much greater importance in those jurisdictions where government commitment to development is much stronger than commitment to biodiversity conservation. Here it becomes a shield against government-supported development initiatives. In Australia, on the other hand, the perceived threat is from governments whose commitment in co-managed areas is not to development but to a particular version of biodiversity conservation that, in theory at least, has the potential to interfere with Aboriginal cultural aspirations. As discussed in the Booderee National Park case study, these make no distinction between natural and cultural heritage, but see nature as an aspect of culture. However, this case study shows that in practice this threat was not realised, and that Aboriginal cultural aspirations can be met without compromising biodiversity conservation objectives.

¹¹⁶ See Szabo and Smyth, 2003, pp. 152 and 159–161.

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Szabo, S. and D. Smyth. 2003. Indigenous Protected Areas in Australia. In H. Jaireth and D. Smyth (eds.). *Innovative Governance: Indigenous Peoples, Local Communities and Protected Areas*. New Delhi: Ane Books.

World Wildlife Fund (WWF) Australia. 2008. Building Nature's Safety Net: Top 10 reserves of the first decade of the National Reserve System. Available at <http://www.wwf.org.au/publications/bnsn-top-10-factsheets.pdf>.

Legal instruments

Most legal instruments discussed in this case study are available online. Readers may view the full text on the ECOLEX web site (www.ecolex.org) using the hyperlinks below, or at the URL provided.

Commonwealth Acts

Aboriginal Land Grant (Jervis Bay Territory) Act 1986	LEX-FAOC072512
Aboriginal Land Grant and Management (Jervis Bay Territory) Legislation Amendment Act 1995	see consolidated version
Aboriginal Land Rights (Northern Territory) Act 1976	LEX-FAOC004198
Environment Protection and Biodiversity Conservation Act 1999	LEX-FAOC017072
Environmental Reform (Consequential Provisions) Act 1999	LEX-FAOC025094
National Parks and Wildlife Act 1975 (repealed)	LEX-FAOC003654
Native Title Act 1993	LEX-FAOC015378
Public Service Act 1999	LEX-FAOC093284
Racial Discrimination Act 1975	LEX-FAOC093286

Commonwealth Regulations

Environment Protection and Biodiversity Conservation Regulations 2000	LEX-FAOC025399
Financial Management and Accountability Regulations 1997	LEX-FAOC093289

State and Territory Acts

Aboriginal Land Rights Act 1983 (NSW)	LEX-FAOC012485
Aborigines Protection Act 1909 (NSW)	http://indigenoustrights.net.au/files/f18.pdf
Aborigines Protection (Amendment) Act 1940 (NSW)	http://www.caught-in-the-act.kathystavrou.net/ab.-prot.-amend.-1940.html
Cobourg Peninsula Land and Sanctuary Act 1981 (NT)	LEX-FAOC015853
Fisheries Management Act 1994 (NSW)	LEX-FAOC013456
Marine Parks Act 1997 (NSW)	LEX-FAOC043534

National Parks and Wildlife Act 1972 (SA)	LEX-FAOC044295
National Parks and Wildlife Act 1974 (NSW)	LEX-FAOC013704
Parks and Reserves (Framework for the Future) Act 2005 (NT)	LEX-FAOC093780
Territory Parks and Wildlife Conservation Act 1977 (NT)	LEX-FAOC044600

State and Territory Ordinances

Aborigines Welfare Ordinance 1954 (ACT)
http://asset0.aiatsis.gov.au:1801/webclient/StreamGate?folder_id=0&dvs=1267959303486~880
Fish Protection Ordinance 1929–1949 (ACT)
Public Parks Ordinance 1928 (ACT)

State and Territory Regulations

Fisheries Management (General) Regulation 2002 (NSW)	LEX-FAOC043006
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Court decisions

Mabo v Queensland (No. 2) [1992] HCA 23; 175 CLR 1; 107 ALR 1
http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html
Western Australia v Ward [2002] HCA 28; 213 CLR 1; 191 ALR 1
http://www.austlii.edu.au/au/cases/cth/HCA/2002/28.html
Wilson v Anderson (2002) 190 ALR 313
http://www.austlii.edu.au/au/cases/cth/HCA/2002/29.html
Yanner v Eaton (1999) 201 CLR 351
http://www.austlii.edu.au/au/cases/cth/HCA/1999/53.html

Agreements

Arakwal Indigenous Land Use Agreement 2001
http://www.environment.nsw.gov.au/resources/parks/arakwallluaScheduleG.pdf
Darug Peoples MOU: A Memorandum of Understanding between NSW Department Environment and Conservation and the Darug People, 27 February 2007
http://www.environment.nsw.gov.au/resources/parks/DarugMOU.pdf
Indigenous Land Use Agreement (Area Agreement): Githabul People 2007
http://www.environment.nsw.gov.au/resources/comanagement/GithabulLUA.pdf
Mungo National Park Joint Management Agreement (2nd Edition) 2004
http://www.environment.nsw.gov.au/resources/parks/MungoNationalParkJointManagementAgreement.pdf

Other instruments

Annexure to Memorandum of Lease between Wreck Bay Aboriginal Community Council and Director of National Parks, 21 October 2003

Commonwealth Procurement Guidelines, Financial Management Guidance No 1, December 2008

<http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html>

Department of the Environment, Water, Heritage and the Arts, Chief Executive's Instruction 4.2, Procurement of Property and Services (undated)

Services Contract Between Director of National Parks and Wreck Bay Enterprises Ltd (ACN 093 444 869)